(Slip Opinion)

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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In the Matter of:	)
Ashland Oil, Inc. Floreffe, PA	) SPCC Appeal No. 91-1
Docket No. PA-88-0001	)

[Decided September 15, 1992]

FINAL DECISION

Before Environmental Appeals Judges Nancy B. Firestone and Ronald L. McCallum.

ASHLAND OIL, INC., FLOREFFE, PA

SPCC Appeal No. 91-1

FINAL DECISION

Decided September 15, 1992

Syllabus

Ashland Oil, Inc. appeals from an initial decision assessing a civil penalty of $51,000 for its failure to prepare and maintain a Spill Prevention Control and Countermeasure ("SPCC") Plan in accordance with 40 CFR Part 112. The initial decision states that Ashland's SPCC Plan failed to meet the requirements of §112.7 because it failed to describe adequately the location of storage tanks and failed to disclose the existence of underground storage tanks. The initial decision also provides that Ashland failed to amend its plan as soon as possible after a change at the facility necessitating an amendment under §112.5.

Held: Section 112.5 requires an SPCC Plan to be amended contemporaneously with the event necessitating the amendment. Ashland's amendment of its SPCC Plan five months after the replacement of a tank violated §112.5. In addition, Ashland's failure to disclose the existence of underground storage tanks demonstrates that Ashland's SPCC Plan was not "carefully thought-out" as required by §112.7. A total penalty of $55,125 is assessed.

Before Environmental Appeals Judges Nancy B. Firestone and Ronald L. McCallum.[1]

Opinion of the Board by Judge Firestone:

Ashland Oil, Inc. appeals the decision of the Presiding Officer assessing a civil penalty of $51,000 for Ashland's failure to prepare and maintain a Spill Prevention Control and Countermeasure ("SPCC") Plan in accordance with 40 CFR Part 112 for its facility in Floreffe, Pennsylvania. Following a hearing held pursuant to 40 CFR Part 114, the Presiding Officer concluded that Ashland's SPCC

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[1] Environmental Appeals Judge Edward E. Reich did not participate in this decision.

Plan was not "carefully thought-out" as required by 40 CFR §112.7 [2] because it failed to describe adequately the location of aboveground storage tanks, and to disclose the existence of underground storage tanks, and therefore Ashland violated 40 CFR §112.3 which requires preparation of an SPCC Plan in accordance with §112.7. The Presiding Officer also concluded that Ashland violated 40 CFR §112.5(a) by failing to amend its SPCC Plan as soon as possible after replacing a 74,000 barrel storage tank with a 96,000 barrel tank. For the reasons set forth below, we affirm the Presiding Officer's conclusion that Ashland violated §§112.3 and 112.5(a), and we assess a penalty of $55,125 for these violations.

Factual and Procedural Background

Ashland owns and operates a petroleum marketing terminal in Floreffe, Pennsylvania. The terminal is adjacent to a small stream, Lobbs Run, which is a tributary of the Monongahela River. On January 2, 1988, Ashland filled, for the first time, a new tank designated as tank 1338. During this filling, the tank ruptured and collapsed, resulting in a spill of approximately 1,000,000 gallons of oil into the Monongahela River. *See* Region's Response, at 4.

During an inspection of the facility on January 7, 1988, Ashland gave the EPA Region III inspector a copy of its SPCC Plan. On the same date, Ashland amended its SPCC Plan to reflect the replacement of old tank 1338, which held 74,000 barrels of oil, with new tank 1338, which was designed to hold 96,000 barrels of oil. The amendment states that construction of new tank 1338 was completed on August 15, 1987, and that the new tank was connected to piping in November 1987.

After reviewing Ashland's SPCC Plan as amended, Region III issued a notice of violation ("NOV") on January 30, 1989. The NOV alleged that Ashland violated 40 CFR §112.3(a) or (b) [3] because its SPCC Plan failed to meet the

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[2] Section 112.7 provides, in relevant part:

> The SPCC Plan shall be a carefully thought-out plan, prepared in accordance with good engineering practices; and which has the full approval of management at a level of authority to commit the necessary resources.

[3] Section 112.3(a) provides that owners and operators of facilities that "have discharged, or, due to their location, could reasonably be expected to discharge oil in harmful quantities * * * into or upon the navigable waters of the United States * * * shall prepare a Spill Prevention Control and

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requirements of 40 CFR §112.7 in two ways: 1) it was not "carefully thought-out" and in accordance with good engineering practices because the plan was generic, not specific to the Floreffe terminal, and 2) it failed to address reasonably anticipated types of equipment failures, or to predict the rate and direction of a possible spill.[4] The NOV also alleged that Ashland violated 40 CFR §112.5(a) by failing to amend its SPCC Plan to reflect the replacement of old tank 1338 immediately upon completion of the new tank on August 15, 1987. The Region sought a penalty of $145,000 for these violations, based on its calculation that the penalty should be $1,000 per day for the 145-day period of non-compliance between August 15, 1987 and January 7, 1988 (between the date the new tank was completed and the date Ashland amended its SPCC plan).

Ashland requested a hearing on the allegations made in the NOV, and the hearing was held on May 17 and 18, 1990, before the Presiding Officer. In February 1991, Ashland filed a motion to dismiss the action on the ground that the Presiding Officer failed to issue a decision within thirty days of the close of the hearing as required by 40 CFR §114.10. The Presiding Officer denied Ashland's motion to dismiss, and issued an initial decision on May 22, 1991.

In the May 22, 1991 decision, the Presiding Officer rejected the Region's contention that Ashland's SPCC Plan was deficient for the reasons advanced by the Region at the hearing. Instead, the Presiding Officer concluded that Ashland's SPCC Plan failed to meet the requirements of §112.7 in two respects: it failed to describe adequately the location of the terminal's storage tanks, and to disclose the existence of the terminal's underground storage tanks. Therefore, the Presiding Officer concluded, Ashland's SPCC Plan was not "carefully thought-out" as required by §112.7, and Ashland violated §112.3 by failing to have an SPCC Plan prepared in accordance with §112.7. Initial Decision, at 7-8.

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[3](...continued)
Countermeasure Plan * * * in accordance with §112.7." Section 112.3(b) is substantially similar. The only difference between the two is the deadline for compliance, which is based on the operational date of the facility in relationship to the effective date of the regulations.

[4] *See* 40 CFR §112.7(b), which provides:

> (b) Where experience indicates a reasonable potential for equipment failure (such as tank overflow, rupture, or leakage), the plan should include a prediction of the direction, rate of flow, and total quantity of oil which would be discharged from the facility as a result of each major type of failure.

The Presiding Officer also determined that the replacement of old tank 1338 with new tank 1338 was a change in the facility requiring an amendment to Ashland's SPCC Plan under §112.5(a). The Presiding Officer interpreted §112.5(a) as requiring the amendment to be made "as soon as possible." Initial Decision, at 13. According to the Presiding Officer, Ashland violated §112.5(a) because its January 7, 1988 amendment to the SPCC Plan was not made as soon as possible after the August 15, 1987 completion of the new tank.

For these two violations, the Presiding Officer assessed a civil penalty of $51,000. This penalty is based on the Presiding Officer's conclusion that a per-day penalty of $750 is appropriate. The Presiding Officer determined that Ashland was in violation of the regulations for the sixty-eight-day period beginning in November 1987, when the new tank was first connected to piping, and ending on January 7, 1988, the date of the inspection and the amendment.

This appeal followed. Ashland urges several reasons for setting aside the Presiding Officer's initial decision. Ashland contends that the Presiding Officer's factual findings are not supported by the record, and that the Presiding Officer failed to find certain facts established by the record. Ashland also maintains that its SPCC Plan fully complies with the requirements of §112.7, that is, that the plan is "carefully thought-out." Ashland argues that the replacement of tank 1338 was not a change in the facility that required an amendment to its SPCC Plan, and even if it was, Ashland amended its plan within the six month period Ashland argues is allowed by §112.5(a). Concerning the penalty, Ashland argues that §311(j) of the Clean Water Act ("CWA"), 33 U.S.C. §1321(j) (1989), [5] does not authorize the imposition of a daily penalty for a continuous violation of the SPCC regulations. Finally, Ashland argues that the Presiding Officer's decision should be set aside because it was not issued within the thirty-day time period provided by 40 CFR §114.10.

The Region did not appeal the Presiding Officer's decision to assess a penalty substantially less than that sought by the Region. Nevertheless, in response to Ashland's appeal, the Region argues that the Presiding Officer should have assessed the penalty sought by the Region. Because reply briefs are limited to issues raised by the appeal, *cf.*, 40 CFR §22.30(a)(2), and because the Region did not file an appeal, we will not consider the Region's arguments concerning aspects of the penalty calculation not raised by Ashland's appeal.

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[5] This statute was amended by the Oil Pollution Act of 1990, Pub. L. No. 101-380, 101 Stat. 484 (1990), after the Presiding Officer's final decision in this case. All references to the CWA in this decision are to the statute in effect prior to the 1990 amendments.

Analysis

A.

Ashland's claim that the Presiding Officer's decision should be set aside because it was not issued within thirty days from the close of the hearing as required by 40 CFR §114.10 [6] is without merit. Because §114.10 is directive, not jurisdictional, the failure to adhere to its terms does not deprive the Presiding Officer of jurisdiction or automatically invalidate the Presiding Officer's decision. The failure to issue a timely decision pursuant to §114.10 requires setting aside a decision only upon a demonstration of specific prejudice resulting from the delay. *See In re Eureka Chemical Co.*, SPCC Appeal No. 84-1, at 3 (Nov. 14, 1985); *In re Proctor Coal Co.*, SPCC 1-96 (Feb. 18, 1977); *In re Brewer Chemical Corp.*, SPCC-IX-27C, at 2-3 (May 19, 1976). Ashland contends that it was prejudiced by the Presiding Officer's delay in that it suffered damage to its business reputation and good-will. Notice of Appeal, at 22. We agree with Region III that any injury to Ashland's business reputation and good-will in this case stemmed from the oil spill, and not from the Presiding Officer's delay in issuing a decision on the merits of the alleged SPCC violations. [7] Ashland has failed to show it was prejudiced by the Presiding Officer's failure to comply with §114.10, and therefore the error is harmless. [8]

B.

Ashland contends that the Presiding Officer's decision contains findings of fact that are not supported by substantial evidence in the record. Notice of Appeal, at 4. Ashland refers to two of the five factual findings the Presiding Officer

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[6] That regulation provides, in pertinent part, that "[w]ithin thirty (30) days after the conclusion of the hearings, the Presiding Officer shall issue findings with respect to the matter, including, where appropriate to the amount of the civil penalty."

[7] Indeed, Ashland's brief on this issue specifically refers to the "adverse publicity from the oil spill." Notice of Appeal, at 23.

[8] Ashland relies upon *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Service v. Dulles*, 354 U.S. 363 (1957); and *Accardi v. Shaugnessy*, 347 U.S. 260 (1954), to argue that the Agency is bound by its own procedural rules. The procedural rules involved in those cases, however, conferred either a substantive benefit or a procedural safeguard upon the party objecting to the agency's failure to follow its own rules. In contrast, the requirement of §114.10 is intended primarily to regulate the Agency's conduct of its internal procedures. *See American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532 (1970).

made early in the proceedings [9] and contained in the initial decision. These findings are:

> 1. Ashland Oil, Inc. ("Ashland"), is the owner and operator of a facility located at Highway 837 and Walton Road in Floreffe, Pennsylvania. The terminal is adjacent to a small stream, Lobbs Run, which is a tributary of the Monongahela River.
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> 2. On January 2, 1988, an oil spill occurred at the facility resulting from the rupture and collapse of tank number 1338. This oil eventually spilled into the Monongahela River.
>
> 3. On January 7, 1988, an EPA inspector visited the facility to determine its compliance with the regulations governing the storage of oil under 40 CFR Part 112. At the time of the inspection, tank number 1338 had a capacity of 96,000 barrels of oil.
>
> 4. The January 7, 1988 inspection revealed the following:
>
> > (a) Ashland replaced old Tank Number 1338 which had a capacity of 74,000 gallons [sic] of oil. This replacement was completed on August 15, 1987.
> >
> > (b) Ashland amended its SPCC Plan on January 7, 1988 to show the replacement of old Tank Number 1338, which had a capacity of 74,000 barrels of oil with new Tank Number 1338, which had a capacity of 96,000 barrels of oil.
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> 5. The new Tank Number 1338 was connected to piping in November, 1987 and was filled to capacity on January 2, 1988.

Initial Decision, at 3-4.

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[9] *See* Presiding Officer's May 14, 1990 Order denying Region's Motion for an Accelerated Decision.

Ashland argues that finding number 3 is impossible because the tank, having ruptured and collapsed five days prior to the inspection (as reflected in finding number 2), had no capacity to hold oil on the date of the inspection. This alleged error is harmless because it had little or no impact on the Presiding Officer's conclusion. The fact germane to the issues in this case is that at the time of its collapse, tank 1338 had a capacity of 96,000 barrels of oil. This fact is undisputed.[10]

Ashland also contends that with respect to finding 4(a), the evidence establishes only that *construction* of the new tank was completed on August 15, 1987, and that the new tank did not replace the old tank until it could be used for oil storage, which occurred in November 1987 when it was connected to the piping. This contention also warrants little discussion. There is no dispute that the construction of the new tank was completed on August 15, 1987. Ashland's amendment to its SPCC Plan (which was made after November 1987), reflects Ashland's determination that the new tank replaced the old tank as of August 15, 1987. [11]

Ashland also argues that the Presiding Officer erred by failing to find certain facts supported by the record, namely, that Ashland's SPCC Plan was "carefully thought-out," and that Ashland had six months after replacing old tank 1338 to amend its SPCC Plan. Notice of Appeal, at 4-7. Contrary to Ashland's suggestions, these are not facts to be found, but rather legal conclusions to be made based upon an interpretation of the applicable regulations. Therefore, we conclude that the Presiding Officer did not err by failing to find these "facts."

C.

Section 112.3 requires that owners and operators of facilities shall prepare an SPCC Plan in accordance with §112.7. [12] Section 112.7 states that "[t]he SPCC Plan shall be a carefully thought-out plan, prepared in accordance with good engineering practices * * *." [13] The Presiding Officer concluded that Ashland

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[10] Ashland's SPCC Plan amendment states that new tank 1338 has a capacity of 96,000 barrels of oil.

[11] Ashland's SPCC Plan amendment states that "on August 15, 1987 a 96,000 barrel tank was re-constructed at Floreffe Terminal in the place of the previous 74,000 barrel tank, No. 1338."

[12] *See* note 3, *supra*.

[13] The "carefully thought-out" requirement is separate from the requirement that a plan be prepared in accordance with good engineering practices. *See In re Mobil Oil Corp.*, SPCC-VII-123

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violated §112.3 because its plan was not "carefully thought-out" in accordance with §112.7. Specifically, the Presiding Officer found that Ashland's plan was not "carefully thought-out" because it "failed to adequately describe tank locations or disclose the existence of underground storage tanks." Initial Decision, at 7.

Ashland argues that §112.7 contains guidelines, not requirements, and therefore there is no requirement that an SPCC Plan be "carefully thought-out." Even if an SPCC Plan is required to be "carefully thought-out," Ashland asserts that its SPCC Plan met this requirement because it provides for adequate containment and therefore need not disclose the location of above and underground storage tanks. Furthermore, Ashland argues that the Region failed to meet its burden of proof on this issue because the inspector admitted that he did not question the draftsman of the plan, who testified in detail about his thought process in making the SPCC Plan.

Ashland's argument focuses on the meaning of the "carefully thought-out" language in the introductory paragraph of §112.7, which provides that an SPCC Plan "*shall* be a carefully thought-out plan." (Emphasis added.) The use of the word "shall" indicates that "carefully thought-out" is a requirement, and not merely a suggestion as Ashland would have us believe. Although §112.7 is entitled "Guidelines for the preparation and implementation of a Spill Prevention Control and Countermeasure Plan," such guidelines are contained in the lettered paragraphs of §112.7, and not in the introductory paragraph of the regulation where the "carefully thought-out" requirement is found. [14] The guidelines in the lettered paragraphs are designed to allow each facility to prepare an SPCC Plan suitable to its particular design and operation. While each guideline may not be mandatory in every case, given the differences among facilities, every SPCC Plan must still satisfy the "carefully thought-out" requirement.

Neither the regulations nor previous SPCC decisions by the Administrator define the "carefully thought-out" requirement. In the absence of any guidance from these sources, we interpret this requirement in light of the purposes of the SPCC regulations. The SPCC regulations were promulgated pursuant to §311(j)(1)(C)

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[13](...continued)
(Mar. [], 1976).

[14] The last sentence of the introductory paragraph of §112.7 provides that a "complete SPCC Plan shall follow the sequence outlined below, and include a discussion of the facility's conformance with the appropriate guidelines listed." The guidelines are then listed in the following lettered paragraphs. The guidelines in the lettered paragraphs use the non-mandatory "should," whereas the introductory paragraph uses the imperative "shall." *See* 38 Fed. Reg. 34,164 (Dec. 11, 1973).

of the CWA. *See* 38 Fed. Reg. 14,334 (Jul. 19, 1973). Section 311(j)(1)(C) provides that regulations shall be issued to establish "procedures * * * to *prevent* discharges of oil * * * and to *contain* such discharges." (Emphasis added.) Consistent with the dual purposes of the regulations, an SPCC Plan should provide for the prevention of oil spills *and* for containment measures if preventative measures fail.

Plainly, a "carefully thought-out" SPCC Plan will address both purposes of prevention and containment. Accordingly, we disagree with Ashland's argument that because its SPCC Plan arguably provided for adequate containment of a smaller spill, there was no need to disclose the existence of underground storage tanks in order to comply with this requirement. The SPCC regulations are intended to prevent spills by requiring owners and operators to address the risks of potential spills at their facilities. The regulations contemplate that spills could occur from underground tanks. [15] The failure to disclose the existence of underground storage tanks strongly suggests that Ashland had no plan to *prevent* a spill from those sources, as required by the SPCC regulations. The disclosure of underground storage tanks is an essential element of a plan to control spills from these sources. The omission of underground storage tanks from the plan [16] is more indicative of carelessness than carefulness in plan preparation. [17]

Therefore, we affirm the Presiding Officer's conclusion that Ashland violated the requirement in §112.7 that its SPCC Plan be "carefully thought-out" by failing to disclose the existence of underground storage tanks. [18]

We also disagree with Ashland's contention that the "carefully thought-out" requirement is a subjective standard that can be satisfied by evidence that the

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[15] *See* 40 CFR §112.1(d) (Part 112 applies to facilities where the underground storage is more than 42,000 gallons of oil and the above ground storage capacity is 1,320 gallons or less of oil).

[16] Ashland does not deny that it made this omission. *See* Hearing Transcript, at 259-262. Charles D. Norton, the Ashland employee who prepared the SPCC Plan, testified that the facility's underground storage tanks were not identified anywhere in the SPCC Plan.

[17] *See, e.g, In re Mobil Oil Corp.*, SPCC-VII-123, at 8 (Mar. [], 1976) (SPCC Plan's failure to describe size, location and composition of dike used for containment shows plan was not, *inter alia*, "carefully thought-out").

[18] The Presiding Officer also concluded that Ashland's plan was not carefully thought out because it failed to adequately describe tank locations. The basis for the Presiding Officer's conclusion is not clear from the record or the regulations. Since the failure to disclose the underground storage tanks clearly violates §112.7 and supports a penalty, we do not need to address whether the failure to adequately describe tank locations was also a violation of §112.7.

person who prepared the plan carefully thought about what he or she put into the plan. If the "carefully thought-out" requirement is subjective, then any plan would meet the requirement provided someone put some thought into it, even though the plan may contain unreasonable errors and/or omissions. A more practical approach is to assess the "carefully thought-out" requirement on an objective basis. The Presiding Officer used an objective approach, and concluded that the failure to disclose the existence of underground storage tanks in a plan intended to provide for prevention and containment of spills from those tanks is an unreasonable omission sufficient to establish a lack of careful planning. The Presiding Officer's application of the "carefully thought-out" requirement is reasonable and consistent with the dual purposes of the SPCC regulations, and Ashland provides no reason to set it aside.

D.

Section 112.5(a), in pertinent part, provides:

> Owners or operators of facilities * * * shall amend the SPCC Plan for such facility in accordance with §112.7 whenever there is a change in facility design, construction, operation or maintenance which materially affects the facility's potential for the discharge of oil into or upon the navigable waters of the United States * * *. Such amendments shall be fully implemented as soon as possible, but not later than six months after such change occurs.

The Presiding Officer concluded that the replacement of old tank 1338 with new tank 1338 on August 15, 1987, was a change in the construction of the facility that materially affected the facility's potential to discharge oil into the navigable waters of the United States because it increased the volumetric capacity of the tank by 30% and placed the tank closer to the dike walls. Thus, according to the Presiding Officer, Ashland's SPCC Plan had to be amended to reflect this change as soon as possible after the change.

Ashland contends that the Presiding Officer erred in finding that the replacement of tank 1338 necessitated an amendment to its SPCC Plan pursuant to 40 CFR §112.5(a). Even if an amendment is required, Ashland maintains that the regulation allows six months to make the amendment. Because Ashland amended its SPCC Plan within six months of the completion of the new tank, Ashland asserts that the Presiding Officer erroneously concluded that Ashland violated §112.5(a) by not making an amendment as soon as possible after the tank replacement.

Section 112.5(a) unambiguously requires an amendment "whenever there is a change in facility * * * construction * * * which materially affects the facility's potential for the discharge of oil into or upon the navigable waters of the United States." It is undisputed that the completion of tank 1338 in August 1987 was a change in the construction of the facility. The issue is whether this change materially affected the facility's potential to discharge oil into navigable waters. Ashland maintains that the change did not materially affect the facility's potential to discharge oil because at all times the containment for tank 1338 was sufficient under the regulations.[19] In other words, according to Ashland, the dike around tank 1338 was sufficient to contain the entire contents of either the old tank or the new tank, and therefore the completion of the new tank did not change the facility's potential to discharge oil.

We disagree. First, the voluntary amendment of its plan on January 7, 1988 evidences Ashland's own determination prior to these proceedings that an amendment is required pursuant to §112.5(a). Second, we agree with the Presiding Officer that the replacement of the old tank with a tank closer to the dike walls and with 30% more volumetric capacity increased the facility's potential to discharge oil. The increase in the capacity of one tank by 30%, or 840,000 gallons of oil, also increases the potential for oil to be discharged into navigable waters.

The next issue is whether the Presiding Officer correctly concluded that Ashland violated §112.5(a) because its amendment was not made as soon as possible after the replacement of tank 1338. In the final order, the Presiding Officer interpreted §112.5(a) as "requir[ing] amendment of a SPCC Plan as soon as possible." Initial Decision, at 13. The Presiding Officer decided that Ashland's amendment five days after the spill (and almost five months after the completion of the new tank) was not "as soon as possible" after the change, and therefore Ashland violated §112.5(a). *Id*. Ashland contends it had six months from the date of the change to make the amendment. We agree with the Presiding Officer that Ashland failed to amend its SPCC Plan in a timely fashion under §112.5(a), but for slightly different reasons.

Although §112.5(a) details the events requiring an amendment to the plan (a change in facility design, construction, operation or maintenance materially affecting the facility's potential to discharge oil into navigable waters), it does not

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[19] *See* §112.7(e)(2)(ii).

explicitly detail the time period within which the amendment must be made. [20] The regulation, however, does provide that a plan shall be amended "whenever" there is such a change, and that the amendment should be "implemented" as soon as possible but not later than six months after the change that necessitated the amendment. This language leads us to conclude that §112.5(a) requires that SPCC Plan amendments be made contemporaneously with the event that triggered the need for the amendment.

Ashland, by arguing that it had up to six months to make the amendment as well as to implement it, equates the amendment itself with its implementation. We interpret the regulation differently. The term "implement" contemplates something in existence to be implemented. This concept is evident throughout the SPCC regulations pertaining to SPCC Plan implementation. [21] Moreover, there is nothing in §112.5(a) to suggest that a contrary interpretation should apply. In addition, we interpret the term "whenever" in §112.5(a) as referring not only to the specific event triggering the need for an amendment, but also as referring to when such an amendment should be made, *i.e.*, contemporaneously with the event. This interpretation allows the amendment to be made before it is implemented. [22]

Finally, this interpretation, in contrast to the one advanced by Ashland, furthers the purposes of the SPCC regulations. As discussed above, the purpose of an SPCC Plan is to provide for prevention and containment of oil spills. Section 112.5(a) identifies several triggering events that are sufficiently significant to warrant an amendment. If the plan is amended as soon as the triggering event occurs, the goals of spill prevention and containment can be promptly achieved and

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[20] In contrast, the only other regulation pertaining to plan amendments expressly allows a facility six months to make the amendment. Section 112.5(b) provides that if, as a result of a review performed every three years, a facility owner or operator determines that an amendment is necessary, "the owner or operator shall amend the SPCC Plan within six months of the review." Given this express six-month authorization for certain amendments, we conclude, for the reasons stated above, that amendments required under §112.5(a) must be contemporaneous with the change in the facility.

[21] For example, the regulations requiring promulgation of SPCC Plans specifically allow implementation within a certain time after promulgation. *See* 40 CFR §§112.3(a) and (b). In fact, in contrast to §112.5(a), these sections specify a set time for promulgation, and provide another set period for implementation, again affirming the view that when the Agency intended to provide a time for preparation of a plan and implementation, it did so expressly.

[22] This is consistent with the Presiding Officer's analysis of the issue in the May 14, 1990 Order, *supra*, note 9, which we find more precise and persuasive than the analysis in the May 22, 1991 Initial Decision. In the Order, the Presiding Officer stated that "[t]he drafters of the regulations clearly knew how to differentiate between the terms 'amend' and 'implement.' I find that 40 CFR §112.5(a) requires that an amendment to an SPCC Plan be made when the change occurs but allows up to six months for full implementation of the amendment." Order, at 6. It is not evident why the Presiding Officer used the more general "as soon as possible" language in the Initial Decision.

enhanced. Allowing six months to lapse prior to amending the SPCC Plan, as Ashland suggests, substantially hampers a facility's ability to prevent and contain a spill because the plan does not reflect the true state of the facility. Indeed, that is exactly what happened here.

Ashland amended its SPCC Plan to reflect the August 15, 1987 replacement of tank 1338 on January 7, 1988. Because the amendment was approximately five months after, and not contemporaneous with, the tank replacement, Ashland violated §112.5(a).

E.

Pursuant to 40 CFR §114.1, the Presiding Officer imposed a $51,000 penalty for Ashland's violations of §§112.3 and 112.5. Section 114.1, [23] in pertinent part, provides:

> Owners or operators of facilities * * * who violate the requirements of part 112 of this subchapter D by failing or refusing to comply with any of the provisions of §112.3, 112.4 or 112.5 of this subchapter shall be liable for a civil penalty of not more than $5,000 for each day such violation continues.

The Region sought a penalty of $145,000 on the ground that Ashland's violations required a penalty of $1,000 per day for the 145-day period between August 15, 1987 (the date new tank 1338 was complete) and January 7, 1988 (the date Ashland amended its SPCC Plan and EPA inspected the facility). Instead, the Presiding Officer decided that the period of non-compliance began in November 1987 when the new tank was connected to the piping, and ended on January 7, 1988. According to the Presiding Officer, this period equaled sixty-eight days. The Presiding Officer decided that a per day penalty of $750 is appropriate, for a total penalty of $51,000.

Ashland contests this penalty assessment solely on the ground that §114.1 allows penalties up to $5,000 per day of violation and thus conflicts with §311(j)(2) of the CWA, [24] which Ashland contends authorizes a maximum penalty of $5,000

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[23] This regulation is substantially similar to 40 CFR §112.6, which also authorizes daily penalties of up to $5,000 for violations of Part 112.

[24] Section 311(j)(2) provides that "[a]ny owner or operator of a * * * facility * * * subject to any regulation issued under paragraph (1) of this subsection who fails or refuses to

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for each violation. Ashland requests that the Presiding Officer's decision be set aside on this ground, or in the alternative, that the amount of the penalty be reduced.

Generally, the validity of final Agency regulations is not reviewable in Agency enforcement proceedings. [25] Otherwise, Agency enforcement proceedings would turn into routine requests to reconsider regulations at the expense of scarce Agency resources and established rulemaking procedures. *In re Dow Chemical Co.*, TSCA (16(a))-1, at 9, 13 (July 28, 1982). [26] Accordingly, we will not review the validity of §114.1 in this proceeding.

Even if we were to review this issue, we are not persuaded by Ashland's argument. Ashland argues that provisions in the Oil Pollution Act of 1990 ("OPA") confirm its conclusion that the regulations authorizing daily penalties conflict with the statute authorizing penalties for violations of the SPCC regulations, CWA §311(j)(2). The OPA amended §311(j), and the new version expressly allows penalties for each day of a violation. Ashland contends that this represents a change from the original CWA §311(j)(2) penalty provision applicable here. To the contrary, we conclude that the OPA only clarified, but did not change, the law. The regulations authorizing daily penalties for violations of the SPCC rules are valid Agency interpretations of §311(j)(2) as it existed prior to the OPA. By amending §311(j)(2) to allow for daily penalties, Congress merely ratified the Agency's longstanding interpretation of the law. *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-382 (1969) (years of administrative statutory construction undisturbed until Congress expressly adopted that construction reinforces natural conclusion that Agency correctly construed prior law). [27]

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[24](...continued)
comply with the provisions of such regulations shall be liable to a civil penalty of not more than $5,000 for each violation * * *."

[25] *See In re Dow Chemical Co.*, TSCA (16(a))-1 (July 28, 1982). *See also In re Federal-Hoffman, Inc.*, RCRA (3008) Appeal No. 87-15, at 2 (Dec. 18, 1989); *In re South Coast Chemical, Inc.*, FIFRA Appeal No. 84-4, at 10 (Mar. 11, 1986); *In re American Ecological Recycling Research Corp.*, RCRA (3008) Appeal No. 83-3, at 5 (July 18, 1985); *In re Georgia Pacific Corp.*, NPDES Appeal No. 84-2, at 3 n.3 (Apr. 29, 1985).

[26] *See also RSR Corp. v. Donovan*, 747 F.2d 294, 301 (5th Cir. 1984) ("An agency has an interest in finality and conservation of its resources. It should not be compelled to defend the same regulation against identical attacks in successive enforcement actions, when those challenges could and should have been asserted in the period for pre-enforcement review").

[27] We also note that the Ashland employee who prepared the SPCC Plan believed that the penalty "for not having a plan is $5,000/day." *See* Complainant's Prehearing Exchange, Enclosure 1.

Although we agree with the Presiding Officer that daily penalties are valid, we disagree with the Presiding Officer's calculation of the number of days Ashland was in non-compliance with §§112.7 and 112.5(a). According to the Presiding Officer, the period of non-compliance began when new tank 1338 was connected to piping in November 1987, and thereby first posed a threat of discharge, and ended sixty-eight days later when Ashland amended its SPCC Plan. The Presiding Officer neglected to explain how the occurrence and continuation of each violation correlates with this period of non-compliance.

We conclude that the Presiding Officer did not establish the proper correlation. Ashland's violation of §112.5(a) occurred when Ashland failed to amend its plan contemporaneously with the August 15, 1987 completion of the new tank, not when the tank was connected to the piping. [28] This period is 145 days. Concerning the violation of §112.7, it is arbitrary to relate this violation (the failure to disclose underground storage tanks in the SPCC Plan) to the date when the new tank was connected to the piping, or for that matter, to the date when construction of the new tank was complete, as urged by the Region. Because it did not exist when the original SPCC Plan was made, the new tank obviously has nothing to do with the adequacy of the original SPCC Plan. The completion of the new tank is relevant only for determining Ashland's compliance with the amendment requirement in §112.5(a). Accordingly, for lack of any other date advanced by the Region as the commencement of the period of non-compliance, we conclude that a one-day period of non-compliance is appropriate for Ashland's failure to prepare a "carefully thought-out" plan.

Although we disagree with the Presiding Officer's calculation of the period of non-compliance, based on the record before us we have no basis for questioning the $750 penalty amount assessed for both violations. Ashland does not contest this amount, and the Region did not appeal the Presiding Officer's decision to assess this amount. In the absence of any contrary indication, we assume that the $750 penalty is evenly divisible between the two violations. Therefore we conclude that a penalty of $375 is sufficient for Ashland's violation of §112.5(a). Accordingly, Ashland's violation of §112.5(a), (failure to amend its plan), a 145-day violation, warrants a penalty of $54,375. With regard to Ashland's failure to prepare a "carefully thought-out" plan in accordance with §112.7, we conclude that $375 is

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[28] It is not clear why the Presiding Officer selected the November 1987 starting date for the period of non-compliance, as she had previously determined that Ashland violated §112.5(a) by not amending its SPCC Plan as soon as possible after the August 15, 1987 replacement of tank 1338.

not an adequate penalty, but that Ashland should be assessed a penalty of $750 for this violation. The total penalty for the two violations is $55,125. [29]

Conclusion

The Presiding Officer's decision that Ashland violated 40 CFR §112.3 by failing to have a SPCC Plan prepared in a "carefully thought-out" manner as required by 40 CFR §112.7 because the plan failed to disclose the existence of underground storage tanks is hereby affirmed. In this case, based on the record before us, we conclude that this was a single violation for which a one-day penalty of $750 is appropriate. The Presiding Officer's decision that Ashland violated §112.5(a) is also affirmed, but for the reason that Ashland failed to amend its SPCC Plan contemporaneously with the August 15, 1987 completion of new tank 1338. Because Ashland did not amend its plan until January 7, 1988, Ashland violated §112.5(a) for a period of 145 days. This violation warrants a per-day penalty of $375. Accordingly, we hereby assess a civil penalty of $55,125 against Ashland. Ashland shall pay the penalty assessed within sixty (60) days of service of this order by forwarding to the Regional Hearing Clerk, U.S. EPA Region III, a cashier's or certified check payable to the United States of America in the amount of $55,125.

So Ordered.

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[29] We note that as a result of the Oil Pollution Act of 1990, the authorized penalty amounts increased from $5,000 to $25,000 per day; accordingly, the penalty assessment in this case should not be given any precedential value. Indeed, we would expect in future cases involving violations of these regulations that far larger penalties would be assessed.